IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 735

FEDERAL POWER COMMISSION,
Petitioner,

vs.

SIERRA PACIFIC POWER COMPANY,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN ANSWER TO PETITION FOR CERTIORARI

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May 5, 1955.

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No. 736

FEDERAL POWER COMMISSION,

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The primary issue presented by this petition and the companion petition filed in No. 744 by the Pacific Gas and Electric Company is identical with the issue presented in the petitions of United Gas Pipe Line Company in No. 436 and the Federal Power Commission in No. 556, both against Mobile Gas Service Corporation, as respondent, in which certiorari was granted by this Court. That issue is whether a contract between two utility companies for the purchase and sale of gas (here electric power) at a fixed rate for a term of years, which contract has been accepted for filing by the Federal Power Commission,

remains legal and binding until and unless the contract is found to be against the public interest by the Federal Power Commission, or whether such a contract may be abrogated unilaterally at any time by the selling company by the mere filing of a schedule of higher rates, regardless of the reasonableness of the contract rate.

Our contentions in support of the decisions below are fully set forth in our briefs filed with this Court in opposition to the petitions for certiorari in Nos. 436 and 556.

The only apparent difference between the two cases is that the case involved in Nos. 436 and 556 arose under the Natural Gas Act, whereas the case involved in the present petition arose under the Federal Power Act. However, so far as the basic issue involved is concerned, the two Acts are so substantially identical that a decision by this Court in one would necessarily be controlling in the other. In each case a public utility company had entered into a contract to sell, in the *Mobile* case natural gas, and in the present case electric power, at wholesale to another public utility company for resale by it to its customers, at a fixed rate and for a fixed period of time. Both contracts had been accepted for filing by the Federal Power Commission and therefore constituted the legal rate. In each case the selling company sought to abrogate its contract by the device of merely filing a schedule of higher rates before the Federal Power Commission without obtaining the consent of the purchasing company to such increases in the contract rate, and in each case the purchasing company filed a petition with the Federal Power Commission alleging the existence of the contract and asking that the filing be rejected as unlawful because in violation of the contract. Both Mobile and Sierra,

[1] Hereinafter sometimes referred to as "the *Mobile* case".

[2] Hereinafter sometimes referred to as "the *Sierra* case".

the respective purchasing companies, contended that a duly filed rate contract is valid and binding until and unless found to be against the public interest by the Federal Power Commission, after a hearing under the appropriate provisions of the respective Acts.

In the *Mobile* case the Commission dismissed Mobile's petition on the ground that the existence of a contract did not prevent the selling company from increasing the rate by the unilateral act of filing a schedule of increases. The Court of Appeals for the Third Circuit reversed the Commission on the ground that the contract was valid and binding until and unless the contract were found to be unreasonable by the Commission in an appropriate proceeding.[3]

In the *Sierra* case, the Commission denied the relief sought (that the filing be rejected), but ordered hearings as to the reasonableness of the proposed new rates and reserved Sierra's right to advance its contentions at such hearings. After hearings the Commission (Commissioners Smith and Doty dissenting) held that the proposed new rate was neither exorbitant, discriminatory nor preferential and was therefore lawful, and dismissed Sierra's contentions, holding as it had in the *Mobile* case that the rate provisions in the contract had no binding effect. On petition for review to the Court of Appeals for the District of Columbia Circuit, Sierra urged, first, that the Commission had erred as a matter of law in holding that the contract rate could be unilaterally abrogated without a finding by the Commission that the contract was unreasonable, and, secondly, that in any event, the Commission's finding that the proposed new rate was lawful in the light of the circumstances

[3] *Mobile Gas Service Corporation* v. *Federal Power Commission*, 215 F. 2d 883 (1954), *cert.* granted, Feb. 28, 1955, Nos. 436, 550.

surrounding the negotiations of the contract was arbitrary, capricious and contrary to the evidence. The Court of Appeals, citing the decision of the Third Circuit in the *Mobile* case, reversed the Commission on the law, holding that the contract rate was valid and binding until and unless it were found to be unreasonable in an appropriate proceeding.[4] Thus the Court of Appeals did not reach the issue raised by Sierra as to whether or not the Commission's order was arbitrary and contrary to the evidence.

It will be seen from the foregoing that the issue decided by the Courts below is identical in each case.[5] Accordingly, while we believe the decisions below in both cases were clearly correct, we recognize that inasmuch as this Court has granted certiorari in the *Mobile* case, justice requires that the instant petition be not denied prior to the decision of this Court in the *Mobile* case.

It is also apparent that while a reversal by this Court on the question of law determined by the Third Circuit in the *Mobile* case would require a reversal of that question in the instant case, such a result would leave undetermined Sierra's contentions in the instant case as to the arbitrary nature of the Commission's findings and order. In order that these contentions may be presented to this Court either as a further ground for sustaining the decision below or as a ground for remanding the

[4] The opinion of the Court of Appeals is not yet reported. See Appendix to Petition, pp. 1a, *et seq.*

[5] Petitioner, although conceding that the two cases "present[s] substantially the same question" (Pet. p. 9), asserts that because there has been a hearing and finding as to the reasonableness of the new rate, whereas there has been no such hearing or finding in the *Mobile* case, "the posture of the instant case is different from that in No. 556" (Pet. p. 11). We think this is a distinction without a difference. In both cases the purchasing company has been compelled to pay a rate in excess of that provided by its contract for a period of years without any finding as to the unreasonableness of that contract. Under the statutes as construed by the Courts below, such payments were illegal in both cases. The fact that a hearing has been held, resulting in a finding that the proposed new rate was reasonable, is immaterial.

case to the Court below for further action in the event of a reversal on the question of law, we join with the Solicitor General in requesting that the petition be not held over until the determination in the *Mobile* case, but that it be granted and the case set down for argument on the same day as the *Mobile* case, to the end that all questions in both cases may be fully presented to this Court.

Respectfully submitted,

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May 5, 1955.